State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–1681/P1
PJK:cjs:jf

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

AN ACT *to amend* 757.48 (1) (a), 767.045 (4), 767.11 (4), 767.11 (8) (c), 767.11 (12) (a), 767.115 (1) (a), 767.23 (1n), 767.24 (2) (a), 767.24 (5) (cm) and 767.24 (5) (dm); *to repeal and recreate* 767.24 (5) (e); and *to create* 767.11 (14) (a) 2m., 767.11 (14) (d), 767.23 (1n) (b) 2., 767.24 (2) (d), 767.24 (5) (cd), 767.24 (5) (ct), 767.24 (6) (f) and 767.24 (6) (g) of the statutes; **relating to:** creating a rebuttable presumption against awarding a parent joint or sole legal custody if the court finds that the parent has engaged in a pattern or serious incident of abuse, requiring a guardian ad litem and a mediator to have training related to domestic violence, and requiring a guardian ad litem to investigate and a mediator to inquire whether a party in an action affecting the family engaged in domestic violence.

Analysis by the Legislative Reference Bureau

Under current law, in an action affecting the family, such as a divorce or a paternity action, a court must determine the legal custody of a child based on the best interest of the child. Although the court may grant sole legal custody to one parent or joint legal custody to both parents, the court must presume that joint legal custody

is in the child's best interest. The court may grant sole legal custody only if both parents agree to sole legal custody with the same parent or if at least one parent requests sole legal custody and the court finds that: 1) one parent is not capable of performing parental duties or does not wish to have an active role in raising the child; 2) one or more conditions exist that would substantially interfere with the exercise of joint legal custody; or 3) the parties will not be able to cooperate in future decision making. Evidence of child or spousal abuse creates a rebuttable presumption that the parties will not be able to cooperate in future decision making. Current law requires the court to allocate periods of physical placement between the parties if the court orders sole or joint legal custody. The court may deny periods of physical placement with a parent only if the court finds that the physical placement would endanger the child's physical, mental, or emotional health. The statutes list a number of factors that the court must consider in awarding both legal custody and periods of physical placement. Among those factors is whether there is evidence of child or spousal abuse.

This bill provides that, if a court finds by a preponderance of the evidence that a parent has engaged in a pattern or serious incident of spousal abuse, there is a rebuttable presumption that it is detrimental to the child and ~~[illegible]~~ the child's best interest for that parent to have either sole or joint legal custody of the child. This presumption takes precedence over the other rules regarding the determination of legal custody, such as the presumption that joint legal custody is in the child's best interest, and may be rebutted only by a preponderance of evidence that: 1) the abusive party has completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug, and 2) it is in the best interest of the child that the abusive party be given joint or sole legal custody based on the statutory factors that the court must consider in awarding custody and physical placement. If the court finds that a party has engaged in a pattern or serious incident of spousal abuse, the court must state in writing in the custody order whether the presumption against awarding custody to the abusive party was rebutted and, if so, what evidence rebutted the presumption and why its findings related to legal custody and physical placement are in the best interest of the child.

The bill provides that, if the court finds that both parties have engaged in a pattern or serious incident of spousal abuse, for purposes of the presumption the court must attempt to determine which party was the primary physical aggressor. In order to do that, the court must consider a number of specified factors, such as all prior acts of domestic violence between the parties, the relative severity of injuries, if any, whether one of the parties acted in self–defense, and whether there has been a pattern of coercive and abusive behavior.

The bill provides that, if the court grants periods of physical placement to a parent who the court finds has engaged in a pattern or serious incident of spousal abuse, the court must provide for the safety and well–being of the child and for the safety of the other party. The bill specifies a number of actions that the court must consider, and at least one of which the court must impose, for ~~accomplishing this~~, such as requiring supervised periods of physical placement for the abusive parent,

and to maximize the amount of time that each parent may spend with the child

contrary to

maximizing the amount of time that the abusive parent may spend with the child is contrary to the child's best interest and

ensuring the safety of the child and the other party

requiring the exchange of the child in a protected setting or in the presence of an appropriate third party who agrees to assume that responsibility, requiring the abusive parent to attend and complete treatment for batterers as a condition of exercising his or her physical placement, and requiring ~~the~~ an abusive parent to abstain from consuming alcohol during and for at least eight hours before his or her periods of physical placement.

Under current law, a guardian ad litem (GAL) in an action affecting the family must be an attorney and must have completed three hours of approved continuing legal education relating to a GAL's functions. The bill requires the continuing legal education to include training on the dynamics of domestic violence and its effects on children. The bill requires a GAL in an action affecting the family to investigate whether there is evidence of interspousal battery or domestic abuse, to report to the court on the results of the investigation, and, if there is such evidence, to recommend to the court ways in which the safety and well–being of the child and the victim of the battery or abuse may be addressed.

Under current law, at least one session of mediation is required in an action affecting the family if legal custody or physical placement is contested. The bill requires every mediator to have training on the dynamics of domestic violence and its effects on children. Under current law, a mediator may terminate mediation if there is evidence that a party has engaged in interspousal battery or domestic violence. The bill requires a mediator, ~~if~~ at the initial session, to inquire of ~~the parties~~ whether either of them has engaged in interspousal battery or domestic violence. Before deciding whether to approve or reject any agreement that comes out of mediation, the court is required to ascertain from the mediator whether there is evidence of interspousal battery or domestic violence and, if so, the ways in which the agreement addresses the safety and well–being of the child and the victim of the battery or abuse.

~~Under~~ the bill adds the following factors to the factors under current law that a court must consider when awarding legal custody and physical placement: whether the child consistently exhibits emotional disturbance or disruptive behavior after spending time with a parent; whether a parent has attended parenting classes or sought professional services to improve his or her relationship with the child; whether a parent engages the child in activities that are appropriate for the child's age and stage of development; and whether a parent or other person living in a proposed custodial household has a mental or physical impairment that negatively affects the child's intellectual, physical, or emotional well–being. insert 3-A

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 757.48 (1) (a) of the statutes is amended to read:

757.48 **(1)** (a) Except as provided in s. 879.23 (4), in all matters in which a guardian ad litem is appointed by the court, the guardian ad litem shall be an

attorney admitted to practice in this state. In order to be appointed as a guardian ad litem under s. 767.045, an attorney shall have completed 3 hours of approved continuing legal education ~~relating~~ that relates to the functions and duties of a guardian ad litem under ch. 767 and that includes training on the dynamics of domestic violence and the effects of domestic violence on children. victims of domestic violence and on

SECTION 2. 767.045 (4) of the statutes is amended to read:

767.045 **(4)** RESPONSIBILITIES. The guardian ad litem shall be an advocate for the best interests of a minor child as to paternity, legal custody, physical placement, and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child. The guardian ad litem shall consider the factors under s. 767.24 (5) and custody studies under s. 767.11 (14). The guardian ad litem shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and shall report to the court on the results of the investigation. If the guardian ad litem finds evidence of interspousal battery or domestic abuse, the guardian ad litem shall make recommendations to the court addressing the safety and well–being of the child and the victim of the interspousal battery or domestic abuse. The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation made under s. 767.11 (12) and on any parenting plan filed under s. 767.24 (1m). Unless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's legal custody or physical placement under s. 767.24 (5) ~~(b)~~. The guardian ad litem has none of the rights or duties of a general guardian.

(am) subject to s. 767.24 (5) (bm)

(am) 2

****NOTE: The proposed language specified that the GAL must review and comment on an agreed upon parenting plan. Under the statutes, however, any party that seeks sole or joint legal custody or physical placement is supposed to file a parenting plan. There is no provision for filing a joint parenting plan or for agreeing to the other party's parenting plan.

SECTION 3. 767.11 (4) of the statutes is amended to read:

767.11 **(4)** MEDIATOR QUALIFICATIONS. Every mediator assigned under sub. (6) shall have not less than 25 hours of mediation training or not less than 3 years of professional experience in dispute resolution. Every mediator assigned under sub. (6) shall have training on the dynamics of domestic violence and the effects of domestic violence on children. victims of domestic violence and on

SECTION 4. 767.11 (8) (c) of the statutes is amended to read:

767.11 **(8)** (c) The initial session under par. (a) shall be a screening and evaluation mediation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation. Before the initial session, for purposes of determining whether mediation should be terminated under sub. (10) (e) 1., 2., or 4., the mediator shall inquire whether either of the parties has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

****NOTE: I did not include proposed language about the mediator taking into account evidence of abuse in deciding whether to approve or reject an agreement because the statutes do not provide for the mediator to approve or reject the agreements.

SECTION 5. 767.11 (12) (a) of the statutes is amended to read:

767.11 **(12)** (a) Any agreement ~~which~~ that resolves issues of legal custody or periods of physical placement between the parties reached as a result of mediation under this section shall be prepared in writing, reviewed by the attorney, if any, for each party and by any appointed guardian ad litem, and submitted to the court to be included in the court order as a stipulation. Any reviewing attorney or guardian

of each party, outside the presence of the other party,

ad litem shall certify on the mediation agreement that he or she reviewed it and the guardian ad litem, if any, shall comment on the agreement based on the best interest of the child. The mediator shall certify that the written mediation agreement is in the best interest of the child based on the information presented to the mediator and accurately reflects the agreement made between the parties. The court may approve or reject the agreement, based on the best interest of the child. Before approving or rejecting the agreement, the court shall ascertain from the mediator whether there is evidence that either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and, if so, the ways in which the agreement addresses the safety and well–being of the child and the victim of the interspousal battery or domestic abuse. The court shall state in writing its reasons for rejecting an agreement.

SECTION 6. 767.11 (14) (a) 2m. of the statutes is created to read:

767.11 **(14)** (a) 2m. Whether either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

SECTION 7. 767.11 (14) (d) of the statutes is created to read:

767.11 **(14)** (d) If the person or entity investigating the parties under par. (a) does not have professional experience or training related to the dynamics of domestic violence, the person or entity shall consult with a professional with expertise on domestic violence in every investigation under par. (a) in which there is evidence that a party engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

****NOTE: In answer to your question, you don't have to define or further elaborate on "expertise on domestic violence" unless you want to have more control over who is consulted.

SECTION 8. 767.115 (1) (a) of the statutes is amended to read:

767.115 **(1)** (a) At any time during the pendency of an action affecting the family in which a minor child is involved and in which the court or circuit court commissioner determines that it is appropriate and in the best interest of the child, the court or circuit court commissioner, on its own motion, may order the parties to attend a program specified by the court or circuit court commissioner concerning the effects on a child of a dissolution of the marriage. If the court or circuit court commissioner orders the parties to attend a program under this paragraph and there is evidence that one or both of the parties have engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the court or circuit court commissioner may not require the parties to attend the program together or at the same time.

SECTION 9. 767.23 (1n) of the statutes is amended to read:

767.23 **(1n)** (a) Before making any temporary order under sub. (1), the court or circuit court commissioner shall consider those factors that the court is required by this chapter to consider before entering a final judgment on the same subject matter. In making a determination under sub. (1) (a) or (am), the court or circuit court commissioner shall consider the factors under s. 767.24 (5).

(b) If the court or circuit court commissioner makes a temporary child support order that deviates from the amount of support that would be required by using the percentage standard established by the department under s. 49.22 (9), the court or circuit court commissioner shall comply with the requirements of s. 767.25 (1n).

(c) A temporary order under sub. (1) may be based upon the written stipulation of the parties, subject to the approval of the court or the circuit court commissioner.

Temporary orders made by a circuit court commissioner may be reviewed by the court.

SECTION 10. 767.23 (1n) (b) 2. of the statutes is created to read:

767.23 **(1n)** (b) 2. If the court or circuit court commissioner finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and makes a temporary order awarding joint or sole legal custody or periods of physical placement to the party, the court or circuit court commissioner shall comply with the requirements of s. 767.24 (6) (f) and, if appropriate, (g).

SECTION 11. 767.24 (2) (a) of the statutes is amended to read:

767.24 **(2)** (a) Subject to pars. (am), (b) ~~and~~, (c), and (d), based on the best interest of the child and after considering the factors under sub. (5), the court may give joint legal custody or sole legal custody of a minor child.

SECTION 12. 767.24 (2) (d) of the statutes is created to read:

767.24 **(2)** (d) 1. ~~Notwithstanding pars. (am), (b), (c), and subject to sub.~~ if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party. The presumption may be rebutted only by a preponderance of evidence of all of the following:

a. The party who committed the battery or abuse has successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug.

b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under sub. (5).

2. If the court finds under subd. 1. that both parties engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the party who engaged in the battery or abuse for purposes of the presumption under subd. 1. is the party that the court determines was the primary physical aggressor. In determining which party was the primary physical aggressor, the court shall consider all of the following:

a. All prior acts of domestic violence between the parties.

b. The relative severity of the injuries, if any, inflicted upon a party by the other party in any of the prior acts of domestic violence under subd. 2. a.

c. The likelihood of future injury to either of the parties resulting from acts of domestic violence between the parties.

d. Whether either of the parties acted in self–defense in any of the prior acts of domestic violence under subd. 2. a.

e. Whether there is or has been a pattern of coercive and abusive behavior between the parties.

f. Any other factor that the court considers relevant to the determination under this subdivision.

SECTION 13. 767.24 (5) (cd) of the statutes is created to read:

767.24 (5) (cd) Whether the child consistently exhibits emotional disturbance or disruptive behavior after spending time with a parent.

SECTION 14. 767.24 (5) (cm) of the statutes is amended to read:

767.24 **(5)** (cm) The amount and quality of time that each parent has spent with the child in the past, ~~any necessary changes to the parents' custodial roles and any.~~

(cp) Any reasonable life–style changes that a parent proposes to make to be able to spend more time with the child in the future than the parent has spent with the child in the past.

SECTION 15. 767.24 (5) (ct) of the statutes is created to read:

767.24 **(5)** (ct) Whether a parent has attended parenting classes or sought counseling or other professional services to improve and enhance his or her relationship with the child.

SECTION 16. 767.24 (5) (dm) of the statutes is amended to read:

767.24 **(5)** ~~(dm)~~ (am) 6. The age of the child and the child's developmental and educational needs at different ages and whether each parent engages the child in activities that are appropriate for the child's age and stage of development and satisfactorily supervises the child.

SECTION 17. 767.24 (5) (e) of the statutes is repealed and recreated to read:

767.24 **(5)** (e) Whether a party or other person living in a proposed custodial household has a mental or physical impairment that negatively affects the child's intellectual, physical, or emotional well–being.

SECTION 18. 767.24 (6) (f) of the statutes is created to read:

767.24 **(6)** (f) If the court found, under sub. (2) (d), that a party had engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the court shall state in writing whether the presumption against joint or sole legal custody was rebutted and, if so, what evidence rebutted the presumption, and why its findings relating to legal custody and physical placement are in the best interest of the child.

SECTION 19. 767.24 (6) (g) of the statutes is created to read:

767.24 **(6)** (g) If the court found, under sub. (2) (d), that a party had engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and the court awarded periods of physical placement to both parties, the court shall provide for the safety and well–being of the child and for the safety of the party who was the victim of the battery or abuse. For that purpose the court, giving consideration to the availability of services or programs and to the party's ability to pay for those services or programs, shall impose at least one of the following:

1. Requiring the exchange of the child to occur in a protected setting or in the presence of an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.

2. Requiring the child's periods of physical placement with the party who committed the battery or abuse to be supervised by an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.

3. Requiring the party who committed the battery or abuse to pay the costs of supervised physical placement.

4. Requiring the party who committed the battery or abuse to attend and complete, to the satisfaction of the court, treatment for batterers provided through a certified treatment program or by a certified treatment provider as a condition of exercising his or her periods of physical placement.

Insert 12-1

5. Requiring the party who committed the battery or abuse to abstain from possessing or consuming alcohol or any controlled substance during, and for at least 8 hours preceding, his or her periods of physical placement.

6. Prohibiting the party who committed the battery or abuse from having overnight physical placement with the child.

7. Requiring the party who committed the battery or abuse to post a bond for the return and safety of the child.

8. Notwithstanding s. 767.045 (5), requiring the continued appointment of a guardian ad litem for the child.

9. Imposing any other condition that the court determines is necessary for the safety and well–being of the child or the safety of the party who was the victim of the battery or abuse.

Insert 12-12

SECTION 20. Initial applicability.

(1) This act first applies to actions or proceedings that are commenced on the effective date of this subsection, including actions or proceedings to modify a judgment or order granted before the effective date of this subsection.

(END)

at the request of the party who was the victim of the battery or abuse,

D-note

INSERT 3–A

In addition, the bill provides that, if the court found that a parent ~~had~~ engaged in interspousal battery or domestic violence, when the court is awarding legal custody and physical placement ~~the court shall consider~~ the child's safety and well–being and the safety of the other parent ~~is~~ paramount ~~to the best interest of the child and to consideration of the factors~~.

(END OF INSERT 3–A)

INSERT 8–14

SECTION 1. 767.24 (2) (am) of the statutes is amended to read:

767.24 **(2)** (am) ~~The~~ Except as provided in par. (d), the court shall presume that joint legal custody is in the best interest of the child.

History: 1971 c. 149, 157, 211; 1975 c. 39, 122, 200, 283; 1977 c. 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.24; 1981 c. 391; 1985 a. 70, 176; 1987 a. 332 s. 64; 1987 a. 355, 364, 383, 403; 1989 a. 56 s. 259; 1989 a. 359; 1991 a. 32; 1993 a. 213, 446, 481; 1995 a. 77, 100, 275, 289, 343, 375; 1997 a. 35, 191; 1999 a. 9; 2001 a. 109.

SECTION 2. 767.24 (2) (b) (intro.) of the statutes is amended to read:

767.24 **(2)** (b) (intro.) ~~The~~ Except as provided in par. (d), the court may give sole legal custody only if it finds that doing so is in the child's best interest and that either of the following applies:

History: 1971 c. 149, 157, 211; 1975 c. 39, 122, 200, 283; 1977 c. 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.24; 1981 c. 391; 1985 a. 70, 176; 1987 a. 332 s. 64; 1987 a. 355, 364, 383, 403; 1989 a. 56 s. 259; 1989 a. 359; 1991 a. 32; 1993 a. 213, 446, 481; 1995 a. 77, 100, 275, 289, 343, 375; 1997 a. 35, 191; 1999 a. 9; 2001 a. 109.

SECTION 3. 767.24 (2) (c) of the statutes is amended to read:

767.24 **(2)** (c) ~~The~~ Except as provided in par. (d), the court may not give sole legal custody to a parent who refuses to cooperate with the other parent if the court finds that the refusal to cooperate is unreasonable.

History: 1971 c. 149, 157, 211; 1975 c. 39, 122, 200, 283; 1977 c. 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.24; 1981 c. 391; 1985 a. 70, 176; 1987 a. 332 s. 64; 1987 a. 355, 364, 383, 403; 1989 a. 56 s. 259; 1989 a. 359; 1991 a. 32; 1993 a. 213, 446, 481; 1995 a. 77, 100, 275, 289, 343, 375; 1997 a. 35, 191; 1999 a. 9; 2001 a. 109.

(END OF INSERT 8–14)

INSERT 9–20

SECTION 4. 767.24 (4) (a) 2. of the statutes is amended to read:

767.24 **(4)** (a) 2. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5). ~~The~~ (am),

subject to sub. (5) (bm). Except as provided in par. (e), the court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.

History: 1971 c. 149, 157, 211; 1975 c. 39, 122, 200, 283; 1977 c. 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.24; 1981 c. 391; 1985 a. 70, 176; 1987 a. 332 s. 64; 1987 a. 355, 364, 383, 403; 1989 a. 56 s. 259; 1989 a. 359; 1991 a. 32; 1993 a. 213, 446, 481; 1995 a. 77, 100, 275, 289, 343, 375; 1997 a. 35, 191; 1999 a. 9; 2001 a. 109.

SECTION 5. 767.24 (4) (e) of the statutes is created to read:

767.24 **(4)** (e) If the court found under sub. (2) (d) that a parent had engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and the court grants periods of physical placement to both parents, all of the following apply:

1. Maximizing the amount of time that the child may spend with the parent who committed the battery or abuse is contrary to best interest of the child.

2. The court shall provide for the safety and well–being of the child and for the safety of the parent who was the victim of the battery or abuse as provided in sub. (6) (g).

SECTION 6. 767.24 (5) (intro.) of the statutes is renumbered 767.24 (5) (am) (intro.) and amended to read:

767.24 **(5)** (am) (intro.) ~~In~~ Subject to par. (bm), in determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. ~~The~~

Subject to par. (bm), the court shall consider the following factors in making its determination:

History: 1971 c. 149, 157, 211; 1975 c. 39, 122, 200, 283; 1977 c. 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.24; 1981 c. 391; 1985 a. 70, 176; 1987 a. 332 s. 64; 1987 a. 355, 364, 383, 403; 1989 a. 56 s. 259; 1989 a. 359; 1991 a. 32; 1993 a. 213, 446, 481; 1995 a. 77, 100, 275, 289, 343, 375; 1997 a. 35, 191; 1999 a. 9; 2001 a. 109.

SECTION 7. 767.24 (5) (a) of the statutes is renumbered 767.24 (5) (am) 1.

SECTION 8. 767.24 (5) (am) 7. of the statutes is created to read:

767.24 **(5)** (am) 7. Whether a party or other person living in a proposed custodial household has a mental or physical impairment that negatively affects the child's intellectual, physical, or emptional well–being.

SECTION 9. 767.24 (5) (b) of the statutes is renumbered 767.24 (5) (am) 2.

SECTION 10. 767.24 (5) (bm) of the statutes is created to read:

767.24 **(5)** (bm) If the court found under sub. (2) (d) that a parent had engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the safety and well–being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody and periods of physical placement.

SECTION 11. 767.24 (5) (c) of the statutes is renumbered 767.24 (5) (am) 3.

SECTION 12. 767.24 (5) (cm) of the statutes is renumbered 767.24 (5) (am) 4.

SECTION 13. 767.24 (5) (d) of the statutes is renumbered 767.24 (5) (am) 5.

(END OF INSERT 9–20)

INSERT 10–18

SECTION 14. 767.24 (5) (em) of the statutes is renumbered 767.24 (5) (am) 8.

SECTION 15. 767.24 (5) (f) of the statutes is renumbered 767.24 (5) (am) 9.

SECTION 16. 767.24 (5) (fm) of the statutes is renumbered 767.24 (5) (am) 10.

SECTION 17. 767.24 (5) (g) of the statutes is renumbered 767.24 (5) (am) 11.

SECTION 18. 767.24 (5) (h) of the statutes is renumbered 767.24 (5) (am) 12.

SECTION 19. 767.24 (5) (i) of the statutes is renumbered 767.24 (5) (am) 13.

SECTION 20. 767.24 (5) (j) of the statutes is renumbered 767.24 (5) (am) 14.

SECTION 21. 767.24 (5) (jm) of the statutes is renumbered 767.24 (5) (am) 15.

SECTION 22. 767.24 (5) (k) of the statutes is renumbered 767.24 (5) (am) 16.

(END OF INSERT 10–18)

INSERT 12–1

both has a significant problem with alcohol or drug abuse, requiring that party

(END OF INSERT 12–1)

INSERT 12–12

SECTION 23. 767.325 (5m) of the statutes is amended to read:

767.325 **(5m)** FACTORS TO CONSIDER. In all actions to modify legal custody or physical placement orders, the court shall consider the factors under s. 767.24 (5) (am), subject to s. 767.24 (5) (bm), and shall make its determination in a manner consistent with s. 767.24.

History: 1987 a. 355, 364; 1995 a. 27 s. 9126 (19); 1999 a. 9.

(END OF INSERT 12–12)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1681/1dn
PJK:~~cjs:if~~ /
gjs

1. The state Supreme Court has regulatory authority over attorneys and the legal profession. Supreme Court Rule (SCR) 35.015 (1), which is effective July 1, 2003, requires a GAL to have 6 hours of GAL education during the combined current and immediately preceding reporting periods, and at least 3 of those hours must be family court GAL education under SCR 35.03 (1m), which is also effective July 1, 2003, and which includes, under SCR 35.03 (1m) (a) 4., "the dynamics and impact of family violence."

I did not change the hours in s. 757.48 (1) (a) in the draft to avoid any conflict with the SCRs and since SCR 35.03 (1m) (a) 4. seems to address the GAL education concern that you have. In addition, the statute is less specific than the SCR on when the CLE hours must be completed. The statute requires 3 hours, but does not specify if those hours are during the current reporting period, for all time, etc.

Bob Nelson, whose subject area includes the SCRs, was unaware and very surprised that the statutes specify hours, because of the authority of the Supreme Court to regulate the area and the separation of powers issue.

2. This draft does not include a listing of the types of evidence that a court may consider for determining whether domestic violence has occurred. Because the suggested list comes from the Administrative Code and is to be used by W–2 agencies, it is not appropriate for use by courts. The types of evidence included on the list do not comply with the rules of evidence, which must be followed in legal proceedings. Including many of the listed types would require providing exceptions to the rules of evidence in chs. 885 to 911. I have discussed this issue with (the same) Bob Nelson, who drafts "Courts and Procedure," and neither he nor I want to read and assess every section in chs. 885 to 911 to determine if an exception needs to be made unless you are positive that you want to include the list of types of evidence and provide exceptions to the rules of evidence.

Besides making exceptions to the rules of evidence, I have a number of concerns about including the list. First, I am not sure who you want to use the list. The court? Mediators? Guardians ad litem? All of them? Chapter 767 currently contains numerous references to "evidence of interspousal battery, as described under s. 940.19 or 940.20 (1m) or domestic abuse, as defined in s. 813.12 (1) (am)." (See ss. 767.11 (8)

(b) 2. and (10) (e) 2. and 767.24 (1m) (b), (c), and (o), (2) (b) 2. c., and (5) (i).) What constitutes "evidence" is not specified for those sections and I have never heard that this is a problem. Determining what evidence is permissible, admissible, and relevant is what courts do, based on the rules of evidence. Secondly, each situation is different. By listing what evidence may be used to corroborate domestic abuse, you may be leaving out other types of evidence that a court would consider in a particular case. There may be situations in which the types of evidence included on the list do not exist. In court, oral testimony is usually the most important. The suggested list doesn't even mention oral testimony and is heavy on written statements. In court, written statements may not even be admissible because the demeanor of a witness is important. If your concern is mediators, common sense as to what evidence to consider should be all they need for their purposes, which are not adjudicatory. Current law allows a mediator to terminate mediation if there is evidence of interspousal battery or domestic abuse without listing what constitutes evidence. For the mediator's purposes, considering evidence that consists of nothing more than a party's statement does not violate due process. Even if there is nothing more than a party's statement that domestic abuse occurred, that is evidence.

If you still feel that you need to include a list of the types of evidence of domestic abuse, please be specific about who is to use the list. If the court must use the list, Bob and I will have to go through chs. 885 to 911 to determine where we need to provide exceptions for the items on the list.

3. As I discussed with Tom Powell, there is no statutory provision that allows the parties in a divorce or other family action to waive mediation. If the parties disagree on custody or physical placement, they must attend at least one mediation session, unless the court decides that attending a session would cause undue hardship or would endanger the health or safety of a party. Therefore, this version of the draft does not require anyone to inform the parties that they may waive mediation, because under current law they cannot.

Pamela J. Kahler
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1681/1dn
PJK:cjs:jf

March 18, 2003

1. The state Supreme Court has regulatory authority over attorneys and the legal profession. Supreme Court Rule (SCR) 35.015 (1), which is effective July 1, 2003, requires a GAL to have 6 hours of GAL education during the combined current and immediately preceding reporting periods, and at least 3 of those hours must be family court GAL education under SCR 35.03 (1m), which is also effective July 1, 2003, and which includes, under SCR 35.03 (1m) (a) 4., "the dynamics and impact of family violence."

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Bob Nelson, whose subject area includes the SCRs, was unaware and very surprised that the statutes specify hours, because of the authority of the Supreme Court to regulate the area and the separation of powers issue.

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Besides having to make exceptions to the rules of evidence, I have a number of concerns about including the list. First, I am not sure who you want to use the list. The court? Mediators? Guardians ad litem? All of them? Chapter 767 currently contains numerous references to "evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am)." (See ss. 767.11 (8) (b) 2. and (10) (e) 2. and 767.24 (1m) (b), (c), and (o), (2) (b) 2. c., and (5) (i).) What

constitutes "evidence" is not specified for those sections and I have never heard that this is a problem. Determining what evidence is permissible, admissible, and relevant is what courts do, based on the rules of evidence. Secondly, each situation is different. By listing what evidence may be used to corroborate domestic abuse, you may be leaving out other types of evidence that a court would consider in a particular case. There may be situations in which the types of evidence included on the list do not exist. In court, oral testimony is usually the most important. The suggested list doesn't even mention oral testimony and is heavy on written statements. In court, written statements may not even be admissible because the demeanor of a witness is important. If your concern is mediators, common sense as to what evidence to consider should be all they need for their purposes, which are not adjudicatory. Current law allows a mediator to terminate mediation if there is evidence of interspousal battery or domestic abuse without listing what constitutes evidence. For the mediator's purposes, considering evidence that consists of nothing more than a party's statement does not violate due process. Even if there is nothing more than a party's statement that domestic abuse occurred, that is evidence.

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3. As I discussed with Tom Powell, there is no statutory provision, that I could find, that allows the parties in a divorce or other family action to waive mediation. If the parties disagree on custody or physical placement, they must attend at least one mediation session, unless the court decides that attending a session would cause undue hardship or would endanger the health or safety of a party. Therefore, this version of the draft does not require anyone to inform the parties that they may waive mediation, because under current law they cannot.

Pamela J. Kahler
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Phone: (608) 266–2682
E–mail: pam.kahler@legis.state.wi.us

Kahler, Pam

From: Powell, Thomas
Sent: Thursday, March 20, 2003 3:33 PM
To: Kahler, Pam
Subject: RE: LRB-1681

Pam,
I am forwarding your suggestions on to Patti Seger.
Let's wait to see what she and Rep. Friske decide.
Thanks much
TP

-----Original Message-----
From: Kahler, Pam
Sent: Thursday, March 20, 2003 12:16 PM
To: Powell, Thomas
Subject: LRB-1681

Tom:

After I add the requirement to advise the parties that the court may "waive" mediation, do you want to see a version with only that addition or do you think you may want to include some more changes after Rep. Friske and Patti Seeger have their discussion? As a result of the meeting today:

1. To avoid confusion about the CLE required for GALs and what the bill does, it might be best not to amend s. 767.48 (1) (a) at all in the bill but to mention in the analysis, after mentioning the change in the mediator training, that a Supreme Court Rule requires GALs to have CLE on the same issues.

2. I don't know if this would make the language more palatable, but I could change "contrary to the child's best interest" to "not in the child's best interest" in those places that Rep. Friske pointed out. It might seem less strident.

Let me know if you want to make these changes. Thanks.

Pam

Questions on LRB-1681/1

Page 6.... Line 14 "May not require" does that provide for the option or prevent the order

Page 8...Section 13 seems to be an expansion of the original intent of the bill....please explain how this helps the court consider DV when making initial placement decisions?

Page 10....Strike line three and four

Page 10...Why are we changing the current statute? Are the Mental Health groups on board on this.

Page 11...Strike the underlined portion of line 10, in addition strike line 11 and 12

Page 12... line 14 Strike "shall" and insert "may" or Strike "shall impose" and insert "may consider"

Page 13... Line 7 Strike "and for at least 8 hours" Line 8 Strike "preceding"

Page 13...Strike line 13,14 and 15...Item #8

It is my understanding that our intent with this legislation was to remove the presumption of Joint custody being in the best interest of the child if Domestic Violence was present in the family.

It seems we have gone beyond allowing or compelling the court to consider DV at the initial placement hearing and have attempted to rewrite the custody laws of the state.

consider saying in setting a placement schedule
(in place of maximum)
on p.10 top

insert 939.80

take (4)(e) out 767.24(4)(e)
– as long as (5)(6m) covers it

p.11 lines 7 to 12 → keep as is current law

p.13 "solar" at ordinance (instead of 8 hrs preceding)
and not during

need on Friday

Patti Seger

From: Carol Medaris [cmedaris@wccf.org]
Sent: Tuesday, March 25, 2003 6:07 PM
To: Patti Seger
Subject: RE: Final Draft of Bill...

Patti -- I apologize for being so late in getting back to you on this. I am still not totally well and my brain is a bit mushy, but I will get as far as I can today on this and send it off.

SECTION 1. Regarding the GAL training requirements, I don't think that your statutory requirements are at all redundant. SCR 35.03(1m)(a)4 simply lists appropriate subject matter for family court GAL education courses, and includes "[t]he dynamics and impact of family violence" as one possible subject. It certainly doesn't require that any candidate for GAL actually TAKE a course dealing with DV, or even one that even has domestic violence as a part of the course matter. Your statutory language is the only place where a requirement would exist that every GAL complete at least 3 hours of approved CLE training THAT INCLUDES training on "the dynamics of dv and the effects of dv on victims of dv and on children." (Note repetitive language on line 9, page 4, however.)

That still doesn't answer the question, of course, regarding whether it is appropriate to place specific content requirements for GAL courses in the statute. This is not an area that I am familiar enough with to feel confident about commenting. Margaret Hickey would probably have a better feel for that.

SECTION 6. Do you wish to provide for separate educational programs in cases where the action is one for paternity, as well as in other family law proceedings? (Adding the 767.115(1)(a) language to 767.115(1)(b)?) That would seem to me to be appropriate.

SECTION 15. I would change the tense of this section to the present: "if the court finds . . . that a parent has engaged . . . ."

Then I would restate the rest so that the finding of DV simply removes the requirement for "regular periods" of placement and "maximizing" the time, rather than automatically resulting in a finding that it is contrary to the child's best interest.

This could be done as follows:

767.24(4)(e) If the court finds under sub. (2)(d) that a parent has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 . . .(etc.) , the court need not set a placement schedule that allows the child to have meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, as set forth in sub. (a) 2. If the court grants periods of physical placement with both parents, the court shall provide for the safety and well-being of the child and for the safety of the parent who was the victim of the battery or abuse as provided in sub. (6)(g).

This seems to be to provide a better framework for these cases than the simple declaration that maximizing the time is not in the bloc.

SECTION 20. Again, I would change the tense here to the present. I agree with Laurie's comments regarding the necessity of this language, here, although we may not be able to keep it in.

SECTIONS 35 and 36. Again, I would change the tense here to the present.

SECTION 36. It would seem reasonable to me, instead of requiring the court to order at least one of the provisions on the list to add language making clear that the court shall order any that it deems appropriate. This could be done by changing the last phrase of (g) intro to: . . . shall impose one or more of the following conditions, as the court finds necessary and appropriate. Otherwise, it sounds to me like there is an assumption that one is generally going to be enough -- not the case, it seems to me.

Hope this helps, Patti, and again, apologies for being so late. I will be in tomorrow after 10 or so, if you want to talk. -- Carol

[Carol Medaris]

-----Original Message-----
From: Patti Seger [mailto:pattis@wcadv.org]
Sent: Tuesday, March 25, 2003 9:27 AM
To: 'Ann Krummel' (E-mail); Bob Andersen (E-mail) (E-mail); Carol Medaris (E-mail); Kim Wright (E-mail); 'Laurel Kent' (E-mail); laurie jorgensen (E-mail); 'Linda Balisle' (E-mail); Lisa Macaulay (E-mail); Liz Marquardt (E-mail); Mary Lauby (E-mail); Patti Seger (E-mail); Policy Intern (E-mail); Rep. Don Friske (E-mail); Roberta Rieck (E-mail); Terese Berceau (E-mail); Tess Meuer (E-mail); Thomas Powell (E-mail); 'Tim Gary' (E-mail)
Subject: Final Draft of Bill...

Hey folks-
I am meeting tomorrow w/ the legislators and the drafter on the rebuttable presumption bill. The meeting is at 4 p.m. and we hope to have a final product when we are done. We want this circulated for co-sponsorship prior to our April 2 Lobby Day. If you have thoughts or input, now is the time. Please call or email me. I am most interested in what some of the atty's present at the meeting think...

Patti

Patti Seger
Policy Development Coordinator
Wisconsin Coalition Against Domestic Violence
608-255-0539
fax: 608-255-3560
email: pattis@wcadv.org

State of Wisconsin
2003 – 2004 LEGISLATURE

LRB–1681/2
PJK:cjs:jf

2003 BILL

AN ACT *to repeal* 767.24 (5) (e); *to renumber* 767.24 (5) (a), 767.24 (5) (b), 767.24 (5) (c), 767.24 (5) (cm), 767.24 (5) (d), 767.24 (5) (em), 767.24 (5) (f), 767.24 (5) (fm), 767.24 (5) (g), 767.24 (5) (h), 767.24 (5) (i), 767.24 (5) (j), 767.24 (5) (jm) and 767.24 (5) (k); *to renumber and amend* 767.23 (1n), 767.24 (5) (intro.) and 767.24 (5) (dm); *to amend* 757.48 (1) (a), 767.045 (4), 767.11 (4), 767.11 (8) (c), 767.115 (1) (a), 767.24 (2) (a), 767.24 (2) (am), 767.24 (2) (b) (intro.), 767.24 (2) (c), 767.24 (4) (a) 2. and 767.325 (5m); and *to create* 767.11 (14) (a) 2m., 767.23 (1n) (b) 2., 767.24 (2) (d), 767.24 (4) (e), 767.24 (5) (am) 7., 767.24 (5) (bm), 767.24 (6) (f) and 767.24 (6) (g) of the statutes; **relating to:** creating a rebuttable presumption against awarding a parent joint or sole legal custody if the court finds that the parent has engaged in a pattern or serious incident of abuse, requiring a guardian ad litem and a mediator to have training related to domestic violence, and requiring a guardian ad litem to investigate and a

mediator to inquire whether a party in an action affecting the family engaged in domestic violence.

Analysis by the Legislative Reference Bureau

Under current law, in an action affecting the family, such as a divorce or a paternity action, a court must determine the legal custody of a child based on the best interest of the child. Although the court may grant sole legal custody to one parent or joint legal custody to both parents, the court must presume that joint legal custody is in the child's best interest. The court may grant sole legal custody only if both parents agree to sole legal custody with the same parent or if at least one parent requests sole legal custody and the court finds that: 1) one parent is not capable of performing parental duties or does not wish to have an active role in raising the child; 2) one or more conditions exist that would substantially interfere with the exercise of joint legal custody; or 3) the parties will not be able to cooperate in future decision making. Evidence of child or spousal abuse creates a rebuttable presumption that the parties will not be able to cooperate in future decision making. Current law requires the court to allocate periods of physical placement between the parties if the court orders sole or joint legal custody. [illegible] parent may spend with the child. The court may deny periods of physical placement with a parent only if the court finds that the physical placement would endanger the child's physical, mental, or emotional health. The statutes list a number of factors that the court must consider in awarding both legal custody and periods of physical placement. Among those factors is whether there is evidence of child or spousal abuse.

This bill provides that, if a court finds by a preponderance of the evidence that a parent has engaged in a pattern or serious incident of spousal abuse, there is a rebuttable presumption that it is detrimental to the child and contrary to the child's best interest for that parent to have either sole or joint legal custody of the child. This presumption takes precedence over the other rules regarding the determination of legal custody, such as the presumption that joint legal custody is in the child's best interest, and may be rebutted only by a preponderance of evidence that: 1) the abusive party has completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug, and 2) it is in the best interest of the child that the abusive party be given joint or sole legal custody based on the statutory factors that the court must consider in awarding custody and physical placement. If the court finds that a party has engaged in a pattern or serious incident of spousal abuse, the court must state in writing in the custody order whether the presumption against awarding custody to the abusive party was rebutted and, if so, what evidence rebutted the presumption and why its findings related to legal custody and physical placement are in the best interest of the child.

The bill provides that, if the court finds that both parties have engaged in a pattern or serious incident of spousal abuse, for purposes of the presumption the

court must attempt to determine which party was the primary physical aggressor. In order to do that, the court must consider a number of specified factors, such as all prior acts of domestic violence between the parties, the relative severity of injuries, if any, whether one of the parties acted in self–defense, and whether there has been a pattern of coercive and abusive behavior.

The bill provides that, if the court grants periods of physical placement to a parent who the court finds has engaged in a pattern or serious incident of spousal abuse, ~~maximizing the amount of time that the abusive parent may spend with the child is contrary to the child's best interests and~~ the court must provide for the safety and well–being of the child and for the safety of the other party. The bill specifies a number of actions that the court must consider, and at least one of which the court must impose, for ensuring the safety of the child and the other party, such as requiring supervised periods of physical placement for the abusive parent, requiring the exchange of the child in a protected setting or in the presence of an appropriate third party who agrees to assume that responsibility, requiring the abusive parent to attend and complete treatment for batterers as a condition of exercising his or her physical placement, and ~~prohibiting~~ an abusive parent with an alcohol or drug abuse problem ~~from~~ from consuming alcohol during ~~24 hours before~~ and from being under the influence of alcohol or another drug when the parent is exercising his or her periods of physical placement.

Under current law, a guardian ad litem (GAL) in an action affecting the family must be an attorney and must have completed three hours of approved continuing legal education relating to a GAL's functions. The bill requires the continuing legal education to include training on the dynamics of domestic violence and its effects on victims of domestic violence and on children. The bill requires a GAL in an action affecting the family to investigate whether there is evidence of interspousal battery or domestic abuse, to report to the court on the results of the investigation, and, if there is such evidence, to recommend to the court ways in which the safety and well–being of the child and the victim of the battery or abuse may be addressed.

Under current law, at least one session of mediation is required in an action affecting the family if legal custody or physical placement is contested. The bill requires every mediator to have training on the dynamics of domestic violence and its effects on victims of domestic violence and on children. Under current law, a mediator may terminate mediation if there is evidence that a party has engaged in interspousal battery or domestic violence. The bill requires a mediator, before the initial session, to inquire of each party outside the presence of the other party whether either of them has engaged in interspousal battery or domestic violence.

The bill adds ~~the following factors~~ to the factors under current law that a court must consider when awarding legal custody and physical placement ~~whether a parent engages the child in activities that are appropriate for the child's age and stage of development, and~~ whether a parent or other person living in a proposed custodial household has a mental or physical impairment that negatively affects the child's intellectual, physical, or emotional well–being. In addition, the bill provides that, if the court ~~finds~~ that a parent ~~has~~ engaged in interspousal battery or domestic

violence, when the court is awarding legal custody and physical placement the child's safety and well–being and the safety of the other parent are the paramount concerns.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 757.48 (1) (a) of the statutes is amended to read:

757.48 **(1)** (a) Except as provided in s. 879.23 (4), in all matters in which a guardian ad litem is appointed by the court, the guardian ad litem shall be an attorney admitted to practice in this state. In order to be appointed as a guardian ad litem under s. 767.045, an attorney shall have completed 3 hours of approved continuing legal education ~~relating~~ that relates to the functions and duties of a guardian ad litem under ch. 767 and that includes training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence ~~and on victims of domestic violence~~ and on children.

SECTION 2. 767.045 (4) of the statutes is amended to read:

767.045 **(4)** RESPONSIBILITIES. The guardian ad litem shall be an advocate for the best interests of a minor child as to paternity, legal custody, physical placement, and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interests of the minor child. The guardian ad litem shall consider the factors under s. 767.24 (5) (am), subject to s. 767.24 (5) (bm), and custody studies under s. 767.11 (14). The guardian ad litem shall investigate whether there is evidence that either parent has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and shall report to the court on the results of the investigation. If the guardian ad litem finds evidence of

interspousal battery or domestic abuse, the guardian ad litem shall make recommendations to the court addressing the safety and well–being of the child and the victim of the interspousal battery or domestic abuse. The guardian ad litem shall review and comment to the court on any mediation agreement and stipulation made under s. 767.11 (12) and on any parenting plan filed under s. 767.24 (1m). Unless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's legal custody or physical placement under s. 767.24 (5) ~~(b)~~ (am) 2. The guardian ad litem has none of the rights or duties of a general guardian.

SECTION 3. 767.11 (4) of the statutes is amended to read:

767.11 **(4)** MEDIATOR QUALIFICATIONS. Every mediator assigned under sub. (6) shall have not less than 25 hours of mediation training or not less than 3 years of professional experience in dispute resolution. Every mediator assigned under sub. (6) shall have training on the dynamics of domestic violence and the effects of domestic violence on victims of domestic violence and on children.

Insert 5-15

SECTION 4. 767.11 (8) (c) of the statutes is amended to read:

767.11 **(8)** (c) The initial session under par. (a) shall be a screening and evaluation mediation session to determine whether mediation is appropriate and whether both parties wish to continue in mediation. Before the initial session, for purposes of determining whether mediation should be terminated under sub. (10) (e) 1., 2., or 4., the mediator shall inquire of each party, outside the presence of the other party, whether either of the parties has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

SECTION 5. 767.11 (14) (a) 2m. of the statutes is created to read:

767.11 **(14)** (a) 2m. Whether either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

SECTION 6. 767.115 (1) (a) of the statutes is amended to read:

767.115 **(1)** (a) At any time during the pendency of an action affecting the family in which a minor child is involved and in which the court or circuit court commissioner determines that it is appropriate and in the best interest of the child, the court or circuit court commissioner, on its own motion, may order the parties to attend a program specified by the court or circuit court commissioner concerning the effects on a child of a dissolution of the marriage. If the court or circuit court commissioner orders the parties to attend a program under this paragraph and there is evidence that one or both of the parties have engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the court or circuit court commissioner may not require the parties to attend the program together or at the same time.

SECTION 7. 767.23 (1n) of the statutes is renumbered 767.23 (1n) (a) and amended to read:

767.23 **(1n)** (a) Before making any temporary order under sub. (1), the court or circuit court commissioner shall consider those factors that the court is required by this chapter to consider before entering a final judgment on the same subject matter. In making a determination under sub. (1) (a) or (am), the court or circuit court commissioner shall consider the factors under s. 767.24 (5) (am), subject to s. 767.24 (5) (bm).

(b) 1. If the court or circuit court commissioner makes a temporary child support order that deviates from the amount of support that would be required by

using the percentage standard established by the department under s. 49.22 (9), the court or circuit court commissioner shall comply with the requirements of s. 767.25 (1n).

(c) A temporary order under sub. (1) may be based upon the written stipulation of the parties, subject to the approval of the court or the circuit court commissioner. Temporary orders made by a circuit court commissioner may be reviewed by the court.

SECTION 8. 767.23 (1n) (b) 2. of the statutes is created to read:

767.23 **(1n)** (b) 2. If the court or circuit court commissioner finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and makes a temporary order awarding joint or sole legal custody or periods of physical placement to the party, the court or circuit court commissioner shall comply with the requirements of s. 767.24 (6) (f) and, if appropriate, (g).

SECTION 9. 767.24 (2) (a) of the statutes is amended to read:

767.24 **(2)** (a) Subject to pars. (am), (b) ~~and~~, (c), and (d), based on the best interest of the child and after considering the factors under sub. (5) (am), subject to sub. (5) (bm), the court may give joint legal custody or sole legal custody of a minor child.

SECTION 10. 767.24 (2) (am) of the statutes is amended to read:

767.24 **(2)** (am) ~~The~~ Except as provided in par. (d), the court shall presume that joint legal custody is in the best interest of the child.

SECTION 11. 767.24 (2) (b) (intro.) of the statutes is amended to read:

767.24 **(2)** (b) (intro.) ~~The~~ Except as provided in par. (d), the court may give sole legal custody only if it finds that doing so is in the child's best interest and that either of the following applies:

SECTION 12. 767.24 (2) (c) of the statutes is amended to read:

767.24 **(2)** (c) ~~The~~ Except as provided in par. (d), the court may not give sole legal custody to a parent who refuses to cooperate with the other parent if the court finds that the refusal to cooperate is unreasonable.

SECTION 13. 767.24 (2) (d) of the statutes is created to read:

767.24 **(2)** (d) 1. If the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), pars. (am), (b), and (c) do not apply and there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party. The presumption may be rebutted only by a preponderance of evidence of all of the following:

a. The party who committed the battery or abuse has successfully completed treatment for batterers provided through a certified treatment program or by a certified treatment provider and is not abusing alcohol or any other drug.

b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under sub. (5) (am).

2. If the court finds under subd. 1. that both parties engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the party who engaged in the battery or abuse for purposes of the presumption under subd. 1. is the party that the

court determines was the primary physical aggressor. In determining which party was the primary physical aggressor, the court shall consider all of the following:

a. All prior acts of domestic violence between the parties.

b. The relative severity of the injuries, if any, inflicted upon a party by the other party in any of the prior acts of domestic violence under subd. 2. a.

c. The likelihood of future injury to either of the parties resulting from acts of domestic violence.

d. Whether either of the parties acted in self–defense in any of the prior acts of domestic violence under subd. 2. a.

e. Whether there is or has been a pattern of coercive and abusive behavior between the parties.

f. Any other factor that the court considers relevant to the determination under this subdivision.

insert 9-13

SECTION 14. 767.24 (4) (a) 2. of the statutes is amended to read:

767.24 **(4)** (a) 2. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5). ~~The~~ (am), subject to sub. (5) (bm). Except as provided in par. (e), the court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.

SECTION 15. 767.24 (4) (e) of the statutes is created to read:

767.24 **(4)** (e) If the court found under sub. (2) (d) that a parent had engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19

or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and the court grants periods of physical placement to both parents, all of the following apply:

1. Maximizing the amount of time that the child may spend with the parent who committed the battery or abuse is contrary to best interest of the child.

2. The court shall provide for the safety and well–being of the child and for the safety of the parent who was the victim of the battery or abuse as provided in sub. (6) (g).

SECTION 16. 767.24 (5) (intro.) of the statutes is renumbered 767.24 (5) (am) (intro.) and amended to read:

767.24 **(5)** (am) (intro.) ~~In~~ Subject to par. (bm), in determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian. ~~The~~ Subject to par. (bm), the court shall consider the following factors in making its determination:

SECTION 17. 767.24 (5) (a) of the statutes is renumbered 767.24 (5) (am) 1.

SECTION 18. 767.24 (5) (am) 7. of the statutes is created to read:

767.24 **(5)** (am) 7. Whether a party or other person living in a proposed custodial household has a mental or physical impairment that negatively affects the child's intellectual, physical, or emotional well–being.

SECTION 19. 767.24 (5) (b) of the statutes is renumbered 767.24 (5) (am) 2.

SECTION 20. 767.24 (5) (bm) of the statutes is created to read:

767.24 **(5)** (bm) If the court ~~finds~~ under sub. (2) (d) that a parent ~~has~~ engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the safety and

well–being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody and periods of physical placement.

SECTION 21. 767.24 (5) (c) of the statutes is renumbered 767.24 (5) (am) 3.

SECTION 22. 767.24 (5) (cm) of the statutes is renumbered 767.24 (5) (am) 4.

SECTION 23. 767.24 (5) (d) of the statutes is renumbered 767.24 (5) (am) 5.

SECTION 24. 767.24 (5) (dm) of the statutes is renumbered 767.24 (5) (am) 6. and amended to read:

767.24 **(5)** (am) 6. The age of the child and the child's developmental and educational needs at different ages and whether each parent engages the child in activities that are appropriate for the child's age and stage of development and satisfactorily supervises the child.

SECTION 25. 767.24 (5) (e) of the statutes is repealed.

SECTION 26. 767.24 (5) (em) of the statutes is renumbered 767.24 (5) (am) 8.

SECTION 27. 767.24 (5) (f) of the statutes is renumbered 767.24 (5) (am) 9.

SECTION 28. 767.24 (5) (fm) of the statutes is renumbered 767.24 (5) (am) 10.

SECTION 29. 767.24 (5) (g) of the statutes is renumbered 767.24 (5) (am) 11.

SECTION 30. 767.24 (5) (h) of the statutes is renumbered 767.24 (5) (am) 12.

SECTION 31. 767.24 (5) (i) of the statutes is renumbered 767.24 (5) (am) 13.

SECTION 32. 767.24 (5) (j) of the statutes is renumbered 767.24 (5) (am) 14.

SECTION 33. 767.24 (5) (jm) of the statutes is renumbered 767.24 (5) (am) 15.

SECTION 34. 767.24 (5) (k) of the statutes is renumbered 767.24 (5) (am) 16.

SECTION 35. 767.24 (6) (f) of the statutes is created to read:

767.24 **(6)** (f) If the court finds under sub. (2) (d) that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19

or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), the court shall state in writing whether the presumption against awarding joint or sole legal custody to that party ~~was~~ is rebutted and, if so, what evidence rebutted the presumption, and why its findings relating to legal custody and physical placement are in the best interest of the child.

SECTION 36. 767.24 (6) (g) of the statutes is created to read:

767.24 **(6)** (g) If the court ~~finds~~ finds under sub. (2) (d) that a party ~~has~~ has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am), and the court awards periods of physical placement to both parties, the court shall provide for the safety and well–being of the child and for the safety of the party who was the victim of the battery or abuse. For that purpose the court, giving consideration to the availability of services or programs and to the ~~parties'~~ ability to pay for those services or programs, shall impose ~~one~~ or more of the following, as appropriate:

1. Requiring the exchange of the child to occur in a protected setting or in the presence of an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.

2. Requiring the child's periods of physical placement with the party who committed the battery or abuse to be supervised by an appropriate 3rd party who agrees by affidavit or other supporting evidence to assume the responsibility assigned by the court and to be accountable to the court for his or her actions with respect to the responsibility.

3. Requiring the party who committed the battery or abuse to pay the costs of supervised physical placement.

4. Requiring the party who committed the battery or abuse to attend and complete, to the satisfaction of the court, treatment for batterers provided through a certified treatment program or by a certified treatment provider as a condition of exercising his or her periods of physical placement.

Insert 13-6

5. If the party who committed the battery or abuse has a significant problem with alcohol or drug abuse, ~~requiring~~ that party ~~[illegible]~~ from possessing or consuming alcohol or any controlled substance during ~~[illegible]~~ his or her periods of physical placement.

Prohibiting

6. Prohibiting the party who committed the battery or abuse from having overnight physical placement with the child.

7. Requiring the party who committed the battery or abuse to post a bond for the return and safety of the child.

8. Notwithstanding s. 767.045 (5), at the request of the party who was the victim of the battery or abuse, requiring the continued appointment of a guardian ad litem for the child.

8~~9~~. Imposing any ~~[illegible]~~ condition that the court determines is necessary for the safety and well–being of the child or the safety of the party who was the victim of the battery or abuse.

not specified in subds. 1. to 7.

SECTION 37. 767.325 (5m) of the statutes is amended to read:

767.325 **(5m)** FACTORS TO CONSIDER. In all actions to modify legal custody or physical placement orders, the court shall consider the factors under s. 767.24 (5) (am), subject to s. 767.24 (5) (bm), and shall make its determination in a manner consistent with s. 767.24.

SECTION 38. Initial applicability.

(1) This act first applies to actions or proceedings that are commenced on the effective date of this subsection, including actions or proceedings to modify a judgment or order granted before the effective date of this subsection.

(END)

D-note

INSERT A

on which the court may make its

requires the court or circuit court commissioner to inform the parties that the court may waive the mediation requirement if the court determines that attending a session will cause undue hardship or endanger the health or safety of one of the parties and the ~~basis for the court's~~ determination, ~~which may be~~ evidence of interspousal battery or domestic abuse. The bill also

(END OF INSERT A)

bases

including

INSERT 5–15

SECTION 1. 767.11 (5) (a) of the statutes is renumbered 767.11 (5) (a) (intro.) and amended to read:

767.11 **(5)** (a) (intro.) ~~In~~ Except as provided in sub. (8) (b), in any action affecting the family, including a revision of judgment or order under s. 767.32 or 767.325, in which it appears that legal custody or physical placement is contested, the court or circuit court commissioner shall refer the parties to the director of family court counseling services for possible mediation of those contested issues. The court or circuit court commissioner shall inform the parties ~~that~~ of all of the following:

1. That the confidentiality of communications in mediation is waived if the parties stipulate under sub. (14) (c) that the person who provided mediation to the parties may also conduct the legal custody or physical placement study under sub. (14).

History: 1987 a. 355; 1989 a. 56; 1991 a. 269; Sup. Ct. Order No. 93–03, 179 Wis. 2d xv; 1995 a. 275, 343; 1999 a. 9; 2001 a. 61, 109.

SECTION 2. 767.11 (5) (a) 2. of the statutes is created to read:

767.11 **(5)** (a) 2. That the court may waive the requirement to attend at least one mediation session if the court determines that attending the session will cause

Text as typed

lns 5-15 cont'd

undue hardship or would endanger the health or safety of one of the parties and the ~~basis for the motion~~ determination. bases on which the court may make its

(END OF INSERT 5–15)

INSERT 9–13

SECTION 3. 767.24 (4) (a) 2. of the statutes is amended to read:

767.24 **(4)** (a) 2. In determining the allocation of periods of physical placement, the court shall consider each case on the basis of the factors in sub. (5) (am), subject to sub. (5) (bm). The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.

History: 1971 c. 149, 157, 211; 1975 c. 39, 122, 200, 283; 1977 c. 105, 418; 1979 c. 32 ss. 50, 92 (4); 1979 c. 196; Stats. 1979 s. 767.24; 1981 c. 391; 1985 a. 70, 176; 1987 a. 332 s. 64; 1987 a. 355, 364, 383, 403; 1989 a. 56 s. 259; 1989 a. 359; 1991 a. 32; 1993 a. 213, 446, 481; 1995 a. 77, 100, 275, 289, 343, 375; 1997 a. 35, 191; 1999 a. 9; 2001 a. 109.

(END OF INSERT 9–13)

INSERT 13–6

with being under the influence of alcohol or any controlled substance when the parties exchange the child for periods of physical placement and from

(END OF INSERT 13–6)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1681/2dn
PJK:~~cjs:jf~~

Just a couple of notes regarding the latest changes:

1. I spoke with Mike Dsida, who specializes in criminal law at the LRB, about the language for requiring the abusing parent to be sober when the child is exchanged for physical placement. The technical way to express that would be that the person's alcohol concentration, as defined in s. 340.01 (1v), is less than 0.02. That did not seem appropriate for the purposes of this bill under s. 767.24 (6) (g) 5., so I provided that the person not be under the influence, which is used throughout the statutes. Mike also asked if it might be appropriate to have the court order that the person consent to giving a breath sample, on the assumption that a breath sample would be requested if the other parent called law enforcement and law enforcement responded and tried to determine if the person's alcohol concentration was below 0.02. I don't know how technical you want to be with this issue. If you want to be very technical, let me know and I can specify the alcohol concentration and have the court order the person to consent to giving a breath sample either in this bill or as an amendment.

2. In s. 767.24 (6) (g) (intro.), I did not include the word "necessary" because it seemed to give the court a way out of ordering any of the listed conditions, e.g., the court might determine that none of the conditions was necessary.

Pamela J. Kahler
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–1681/2dn
PJK:cjs:rs

March 28, 2003

Just a couple of notes regarding the latest changes:

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2. In s. 767.24 (6) (g) (intro.), I did not include the word "necessary" because it seemed to give the court a way out of ordering any of the listed conditions, e.g., the court might determine that none of the conditions was necessary.

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Mentkowski, Annie

From: Powell, Thomas
Sent: Monday, March 31, 2003 11:03 AM
To: LRB.Legal
Subject: Draft review: LRB 03-1681/2 Topic: Creating a rebuttable presumption against awarding custody for interspousal battery

It has been requested by <Powell, Thomas> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 03-1681/2 Topic: Creating a rebuttable presumption against awarding custody for interspousal battery